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August 28, 2001

RECEIVED

AUG 28 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie R. Salas, Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, D.C. 20554

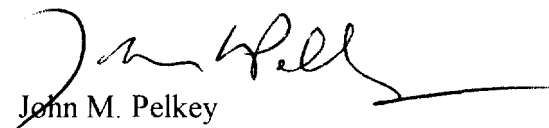
RE: MM Docket No. 00-245
RM-9971
RM-10185
RM-10186

Dear Ms. Salas:

Transmitted herewith on behalf of MainQuad Broadcasting, Inc., are an original and four copies of an Opposition to Request for Leave to File Supplement to be filed in the above-referenced proceeding.

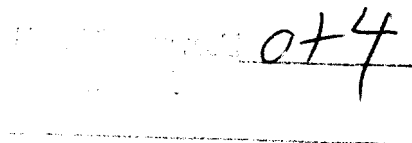
If there are any questions concerning this submission, please contact the undersigned directly.

Sincerely,


John M. Pelkey

JMP/ma

Enclosures



Before The
Federal Communications Commission
Washington, D.C. 20554

RECEIVED

AUG 28 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment of Section 73.202(b))	MM Docket No. 00-245
)	RM-9971
Table of Allotments)	RM-10185
FM Broadcast Stations.)	RM-10186
(Alberta and Dinwiddie, Virginia, and)	
Whitakers and Garysburg, North Carolina))	

To: Chief, Allocations Branch

Opposition to Request for
Leave to File Supplement

MainQuad Broadcasting, Inc. ("MainQuad"), licensee of WSMY-FM, hereby opposes the "Request for Leave to File Supplement and Supplement to Reply Comments" filed by Garysburg Radio on August 14, 2001.

MainQuad's opposition to the Garysburg Radio filing is based on well established Commission precedent. First, Garysburg Radio has no right to supplement its Reply Comments at this late date since such an untimely filing is strictly prohibited by Commission procedure which, in the absence of extenuating circumstances, limits the pleading cycle with respect to counterproposals to a single set of Reply Comments. Although Garysburg Radio alleges there are "new facts" which necessitate the filing of such a "Supplement," it references only facts that were already public knowledge and part of the record in this proceeding as of August 3, 2001, the deadline for submission of Reply Comments. Second, contrary to Garysburg Radio's description of its filing as a "Supplement," the substance of the text actually amounts to the advancement of an entirely new allocation scheme which, in order to have been considered under Commission rules, would have had to have been filed in the form of a counterproposal, the

deadline for which, January 29, 2001, has long since passed. Finally, even if the “Supplement to Reply Comments” offered by Garysburg Radio were to be considered on its merits, the issues it raises are substantively irrelevant, procedurally inappropriate, and, most significantly, contrary to the interests of the public and the communities that lay at the heart of this proceeding. Indeed, by raising arguments that undermine its own counterproposal, the “Supplement” evinces little more than Garysburg Radio’s own conflicted agenda.

I. There Have Been No New Facts Presented in This Proceeding To Justify The Filing of Untimely Comments By Garysburg Radio

In support of its request to file a Supplement, Garysburg Radio claims that the Reply Comments filed by Dinwiddie Radio and MainQuad on August 3, 2001, contained “new factual information not previously presented in this proceeding and to which Garysburg Radio has not previously had an opportunity to respond.”¹

In particular, Garysburg Radio references Dinwiddie Radio’s observation that there is no overlap between the 60 dBu contours of WSMY-FM and the Whitakers facility proposed by MainQuad. In citing this “new fact,” Garysburg never mentions that the facilities proposed by MainQuad have been a matter of public record for more than a year. The original Petition for Rule Making setting forth the proposed coordinates for the Whitakers facility was filed on July 26, 2001, and the application leading to the construction permit for WSMY-FM was filed on June 30, 2000. Garysburg Radio was free at any point during the preceding twelve months to perform its own analysis to determine the coverage areas of the proposed Whitakers facility and WSMY-FM. Garysburg Radio apparently never considered such an analysis to be important enough to warrant including it in its earlier submissions, however. Because MainQuad’s August

¹ Garysburg Radio Request for Leave to File Supplement and Supplement to Reply Comments (hereinafter “Supplement”) at p.1.

3, 2001, Reply Comments provided neither new coordinates nor any other revised engineering parameters, Garysburg Radio's claim that the August 3 Reply Comments included new facts concerning overlapping (or non-overlapping) 60 dBu coverage is simply without merit.²

Another "new fact" Garysburg Radio offers in support of its Supplement is MainQuad's explanation in its August 3 Reply Comments that it had been forced to again take WSMY-FM silent due to complaints of second harmonic interference and the Alberta mayor's response to those complaints. But, again, in order to label these interference issues "new," Garysburg Radio completely disregards information provided by MainQuad in each of its previous filings. In particular, MainQuad explained in its January 29, 2001 Comments and again in its February 13, 2001 Reply Comments that it had taken WSMY-FM (then operating under the call sign of WAQD(FM)) silent because of interference that appeared to be second harmonic interference. See MainQuad Comments at p.2n.3; MainQuad Reply Comments at p.2n.3. Thus, Garysburg Radio's assertion that the existence of second harmonic interference is a new fact first revealed in MainQuad's August 3, 2001, Reply Comments is incorrect.

The date for the submission of Comments and Reply Comments with respect to MainQuad's proposal passed many months ago. Specifically, the *Notice of Proposed Rule Making* ("NPRM") issued by the Commission with respect to MainQuad's proposal established January 29, 2001, as the date for the submission of Comments and February 13, 2001, as the date for the submission of Reply Comments. The Commission's purpose in allowing the submission of Reply Comments on August 3, 2001, was not to permit the filing of further submissions with respect to MainQuad's proposal but, instead, to allow the submission of Reply Comments with

² In any event, as discussed below, whether the 60 dBu contours of WSMY-FM and the proposed Whitakers facility overlap is of no relevance to the proposals before the Commission in the instant proceeding.

respect to the Garysburg Radio and Dinwiddie Radio counterproposals. Seen in its proper light, however, Garysburg Radio's Supplement is not a Supplement to the Reply Comments it filed on August 3, but a proposed Supplement to the Comments that it filed nearly seven months ago.

Given the extreme untimeliness of its Supplement, it was incumbent upon Garysburg Radio to provide a detailed demonstration of good cause for its late submission. This it has failed to do. Because Garysburg Radio is unable to demonstrate that its Supplement is in any way related to facts first raised in the August 3, 2001, Reply Comments filed by Dinwiddie Radio or MainQuad, there is simply no reason for the Commission to abandon its normal procedure of limiting the pleading cycle with respect to counterproposals to a single set of Reply Comments. Accordingly, Garysburg Radio's request that it be granted leave to file the Supplement should be denied.

II. Even If Considered On Its Merits, The Garysburg Supplement, Which Does Little Else But Second an Impermissible Proposal of Dinwiddie Radio, is Procedurally Inappropriate, Based upon a Misunderstanding of the Commission's Rules, And is a Tacit Admission of the Superiority of the MainQuad Proposal.

A. Although Offered in the Form of Comments, Garysburg Radio's "Supplement" Is More Properly Construed as an Untimely Filed and Impermissible Counterproposal.

In its August 3, 2001, Reply Comments, Dinwiddie Radio urged as an alternative to its own proposal that the Commission allocate Channel 299 to Alberta, Virginia, delete Channel 276 from Alberta, modify the license of WSMY-FM to specify Channel 299 as the station's frequency and allocate Channel 276 as a new allocation for Whitakers. In its Supplement, Garysburg Radio "heartily concurs in this argument." Supplement at p.2. There are numerous problems with this counterproposal, however.

First, the August 3, 2001, Dinwiddie Radio counterproposal is grossly untimely. The *NPRM* issued by the Commission in response to MainQuad's proposal to reallocate Channel 276C3

from Alberta to Whitakers specified that any counterproposal would be required to be filed on the date established for the filing of Comments, namely, January 29, 2001. The Appendix to the *NPRM* specifically stated that any counterproposals would “not be considered if advanced in reply comments.” See *NPRM*, Appendix at para. 3(a). In their Comments, Dinwiddie Radio and Garysburg Radio proposed reallocations that were inconsistent with the MainQuad proposal. Neither of those counterproposals, however, suggested that Channel 276C3 be allocated to Whitakers and that the license of WSMY-FM be modified to specify operation on Channel 299. As a result, Dinwiddie Radio’s proposal, now being supported by Garysburg Radio, that Channel 276C3 be allocated to Whitakers and that the license of WSMY-FM be modified to specify operation on Channel 299 comes long after the date established in the *NPRM* for the submission of counterproposals. In keeping with both the plain language of the Appendix to the *NPRM* and Section 1.420 of the Commission’s rules, this untimely counterproposal cannot be considered. See, e.g., *Franklin and White Castle, Louisiana*, 12 FCC Rcd 20168, 20169 (1997).

Second, the untimely counterproposal made by Dinwiddie Radio and seconded by Garysburg Radio is a counterproposal without a proponent. The Commission’s long established policy is that a proposal will not be considered unless the proponent states its present intention to apply for the channel if it is allotted and, if authorized, to build the station promptly. Despite the counterproposal now made by them to allocate Channel 276C3 to Whitakers, neither Dinwiddie Radio nor Garysburg Radio makes the requisite commitment to apply for facilities operating on Channel 276C3 at Whitakers. As a result, the untimely counterproposal must be rejected on this basis alone.

Third, Dinwiddie Radio’s and Garysburg Radio’s obsession with overlapping service areas is simply irrelevant. The relevant inquiry is not whether the coverage areas of the present

and proposed facilities overlap, but whether there is mutual exclusivity between the proposed facilities and the proponent's present facilities. Thus, Section 1.420(i) of the Commission's rules specifies that, in the course of a rule making proceeding to amend the FM Table of Allotments, the Commission may modify the license of an FM broadcast station to specify a new community of license "where the amended allotment would be mutually exclusive with the licensee's or permittee's present assignment." Included in the Comments filed by MainQuad on January 29, 2001, was a spacing study performed by MainQuad Technology. That spacing study demonstrated that the distance between the WSMY-FM facilities and the proposed Alberta allocation is 70.47 kilometers, whereas the FCC's rules require a spacing of 142 kilometers. See MainQuad Comments at Exhibit 1A. In other words, the proposed Whitakers facility is mutually exclusive with WSMY-FM's current facilities. As a result, MainQuad's proposal falls squarely within the situation contemplated by Section 1.420(i).

B. Garysburg Radio and Dinwiddie Radio Now Endorse As an Alternative to Their Original Proposals the Allocation of Channel 276C3 to Whitakers.

Finally, the irony of the untimely Dinwiddie Radio August 3, 2001, counterproposal and Garysburg Radio's wholehearted endorsement of that counterproposal cannot pass unnoticed. Despite their original claims that Dinwiddie and Garysburg are better deserving of first local service than Whitakers, both Dinwiddie Radio and Garysburg Radio find themselves in the situation where, as a fallback position, they are agreeing with MainQuad that the allocation of Channel 276C3 to Whitakers is in the public interest. What separates those two counterproponents from MainQuad is not the question of whether Channel 276C3 should be allocated to Whitakers, but whether MainQuad should be the licensee of that new facility.

Both Dinwiddie Radio and Garysburg Radio have alleged that MainQuad is guilty of gamesmanship.³ If anybody is playing games, however, it is the two counterproponents. It is now apparent that they are more interested in keeping MainQuad out of Whitakers than in seeing that Dinwiddie or Garysburg, or even Alberta, have a radio station. Garysburg Radio's position in this regard is particularly ironic, for Garysburg's wholehearted endorsement of Dinwiddie Radio's proposal to allocate Channel 276C3 to Whitakers is directly at odds with Garysburg Radio's own proposal to allocate that same channel to Garysburg. Channel 276 cannot be allocated to both Garysburg and Dinwiddie, but Garysburg Radio is willing to concede the allocation of Channel 276 to Whitakers, *as long as MainQuad does not get the facility*. Indeed, Garysburg Radio goes so far as to argue that MainQuad's proposal be rejected because it would create a "windfall" for MainQuad by "cut[ting] off the rights of any potential competitor" to apply for a Whitakers allocation. Supplement at p.2. Such an argument, which would have the Commission analyzing the economic benefit to proponents of all such rule makings, has no basis in Commission rules or procedure. The relevant standard here is the public's best interest and not, as Garysburg Radio urges, the best interest of the proponent's competitors.

³ In its August 3, 2001, Reply Comments, Garysburg Radio made much of the fact that MainQuad had ceased operations of WSMY-FM due to the interference complaints that it had received and due to the concerns expressed by Alberta's mayor. Garysburg Radio even went so far as to imply that MainQuad, by remaining silent, had violated the Commission's rule requiring that a licensee that remains silent for more than thirty days must apply for an STA to remain silent. In fact, MainQuad did seek authority to remain silent. A copy of that request is attached hereto. Garysburg Radio incorrectly assumed that, because the request does not appear in the Commission's CDBS, it does not exist. In point of fact, however, because no filing fee accompanies a request to remain silent, silent authority requests are not routinely placed in the CDBS.

MainQuad has been totally up front and above board with the Commission in keeping the Commission apprised of the status of WSMY-FM's operations. MainQuad informed the Commission when, after having commenced program tests just prior to the December 21, 2001, expiration date of its construction permit, it suspended program tests on January 12, 2001 as the result of complaints of interference, sought from the Commission on February 12, 2001, the requisite authority to remain silent, informed the Commission of its return to broadcast operations on July 25, 2001 and further informed the Commission of the fact that it again suspended operations one week later in deference to the request of the mayor of Alberta that WSMY-FM cease operations in order to eliminate interference to television channel 12, which operates on the second harmonic of WSMY-FM's frequency. This record makes it abundantly clear that, through no fault of MainQuad's, the residents of Alberta have received barely one-month's service from WSMY-FM over the last eight months.

C. Adoption of the Garysburg Radio Counterproposal would Deprive Nearly 114,000 People of Additional Service.

Despite casting aspersions at Alberta's mayor's attempt to remove the source of interference to her constituents' reception of television channel 12, Garysburg Radio apparently now recognizes that the problem is a real one and rushes to explain that its counterproposal would also remove Channel 276 from Alberta. That is true. It will. However, it will also deny additional service to nearly 114,000 people. Garysburg Radio seeks to gloss over this defect in its proposal by arguing that Garysburg has more people than Whitakers. Apparently embarrassed by the slight difference in the populations of Whitakers and Garysburg, Garysburg Radio does not even mention the number of additional people that would receive first local service under its counterproposal other than to state that the number is "relatively small." Supplement at p.4. In fact, the number is 197 people. Citing *Rose Hill, Trenton, Aurora, and Ocracoke, North Carolina*, 11 FCC Rcd 21223 (1996), Garysburg Radio argues that such small differences can be significant. Garysburg Radio must have had problems coming up with any precedent that even comes close to supporting its position if the best that it can do is rely upon *Rose Hill, Trenton, Aurora, and Ocracoke, North Carolina*, for, in that case, the differential was 370 people, not the less than 200 people involved in the present case. More fundamentally, however, *Rose Hill, Trenton, Aurora, and Ocracoke, North Carolina* only involved a comparison of first local service to two different communities, one with a population of 284 people and the other with a population of 654 people. Unlike the case here, there was no proponent proposing new service to nearly 114,000 additional people. The present case is far more like *Seabrook, Huntsville, Bryan, Victoria, Kennedy and George West, Texas*, 10 FCC Rcd. 9360 (1995), than *Rose Hill, Trenton, Aurora, and Ocracoke, North Carolina*. In *Seabrook* the Commission squarely confronted the

issue of how to compare two proposals where one of the proposals would provide second full-time aural service, which is given the same weight as the provision of first local service, to 455 persons more than the second proposal, but the second proposal would provide additional service to 122,356 persons more than the first proposal. The resolution adopted by the Commission in *Seabrook* was to find that the provision of second full-time aural service to 455 persons was *de minimis* compared to the provision of additional service to 122,356 people. Certainly, if 455 people is considered to be *de minimis*, 197 people must be considered to be even less than *de minimis*.

As a final point, MainQuad notes that Garysburg Radio continues to imply in its Supplement that MainQuad would be abandoning Alberta. This is simply not true. MainQuad, consistent with *Llano and Marble Falls, Texas*, 12 FCC Rcd 6809 (1997), has made the requisite commitment to apply for Channel 299 at Alberta if the channel is allocated and, if it is awarded the construction permit, to construct the facility promptly. Yet, despite MainQuad's proposal that Channel 299 be allocated to Alberta, both Garysburg Radio and Dinwiddie Radio continue to express concern over the disruption of current service to Alberta pending construction of Channel 299. Although potential disruption is a factor for the Commission to consider, in this case the record is clear that, due to technical issues beyond MainQuad's control, the town of Alberta has not come to rely on service from Channel 276. To the contrary, for the short time that Channel 276 was broadcasting, it was considered by the mayor of Alberta to be a nuisance because it disrupted reception of television Channel 12 for many residents. Therefore, rather than disrupting present service to Alberta from Channel 276, MainQuad's proposal, if adopted, would insure continued interference free service to the community from Channel 12, the nearest NBC affiliate upon which the town does presently rely. Once Channel 299 is

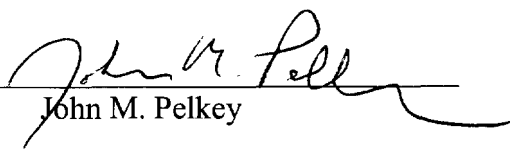
constructed, as called for in MainQuad's proposal, Alberta will have a radio station that it can rely upon without having to sacrifice reception of another important service.

Thus, even if the Commission were to grant leave to Garysburg Radio to file its Supplement, the fact would remain that the points raised in that Supplement are substantively irrelevant. They do nothing more than attempt to muddy the waters and further protract this proceeding. Rather than clarify the record, they merely evidence the fact that, contrary to the Garysburg Radio claims, it is Garysburg Radio – and not MainQuad – that is involved in gamesmanship. The best way to put an end to this gamesmanship is for the Commission to grant the MainQuad proposal as expeditiously as possible, thus allowing (1) the provision of first local service to Whitakers, whose mayor has filed comments supporting the allocation of Channel 276 to that community, (2) the provision of additional service to nearly 114,000 people who would not be served under the proposals of either Garysburg Radio or Dinwiddie Radio, and (3) the elimination of the interference problem to the residents of Alberta, whose mayor has written to the Commission in support of MainQuad's proposal.

Respectfully submitted,

MainQuad Broadcasting, Inc.

By:


John M. Pelkey

STAMP & RETURN



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FEB 12 2001

OUR FILE NO.
20828-101-61
1554-101-61

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

February 12, 2001

Magalie R. Salas, Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

Re: MainQuad Broadcasting, Inc.
WAQD(FM) Alberta, VA
Request for Authority to Remain Silent.

Dear Ms. Salas,

By letter of January 22, 2001, the undersigned informed the Commission that MainQuad Broadcasting, Inc., permittee of WAQD(FM), Alberta, Virginia, had been forced to suspend program tests of WAQD(FM) due to the receipt of complaints that the station was causing interference to the reception of WWBT(TV), which operates on television channel 12 from Richmond, Virginia. That letter also explained that the mayor of Alberta had provided MainQuad with a list of households who had complained to the mayor about the interference apparently being caused by WAQD(FM) to the reception of WWBT(TV).

MainQuad's engineer has now written to each of the complaining households to elicit information concerning the precise nature of the interference being experienced. Unfortunately, the limited number of responses to that letter that have been received to date, coupled with the fact that the responses that have been received do not clearly pinpoint the source of the interference problem, has made it necessary for MainQuad's engineer to take additional steps to obtain the information necessary to isolate the cause of the interference and to devise an appropriate remedy. So as to avoid any unnecessary interference, MainQuad wishes to have WAQD(FM) remain silent until its investigation of the problem can be completed and an appropriate resolution of the problem is devised. Accordingly, MainQuad hereby respectfully requests that the Commission grant it authority to continue its suspension of program tests.

Ms. Magalie R. Salas
February 12, 2001
Page 2

Inasmuch as this request seeks authority for a station to remain silent, no filing fee need accompany this request. The requisite Anti-Drug Abuse Certification is attached hereto.

If there are any questions concerning this request, please contact the undersigned directly.

Sincerely,

A handwritten signature in black ink, appearing to read 'John M. Pelkey', with a long horizontal flourish extending to the right.

John M. Pelkey

JMP:gk

Attachment

ANTI-DRUG ABUSE CERTIFICATION

The applicant certifies that, in the case of an individual applicant, he or she is not subject to a denial of federal benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1986, 21 U.S.C. §862a, or, in the case of a non-individual applicant (e.g. corporation, partnership or other unincorporated association), no party to the application is subject to a denial of federal benefits pursuant to that section. For the definition of a "party" for these purposes, see 47 C.F.R. §1.2002(b).

☒ Yes

☐ No

Name of Applicant: MainQuad Broadcasting, Inc.

Signature:



Title:

President

Date:

2/9/01

CERTIFICATE OF SERVICE

I, Maria Almanza, an employee of Garvey, Schubert & Barer, hereby certifies that the foregoing document was mailed this date by First Class U.S. Mail, postage prepaid, to the following:

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Fletcher, Heald & Hildreth, P.L.C.
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Washington, D.C. 20554


MARIA ALMANZA

August 28, 2001